IN THE HIGH COURT OF JUDICATURE FOR RAJASTHAN AT JODHPUR

JUDGMENT

Commissioner of Income Tax-II, Jodhpur. **Vs.** Shri Ramesh Chand Soni.

D.B. income tax appeal No. 42 / 2004
against the judgment dated 9.5.2003
passed in ITA No.200(JDPR)/2002 for
Assessment Year 1.4.88 to 15.7.98

Date of judgment : 21st Sept., 2004

PRESENT

HON'BLE MR. JUSTICE RAJESH BALIA
HON'BLE MR. JUSTICE AJAY RASTOGI

Mr. Sangeet Lodha for the appellant.
Mr. Anjay Kothari for the respondents on caveat.

BY THE COURT:- (PER HON'BLE R. BALIA, J.)

Heard learned counsel for the parties.

This appeal is directed against the order of Income Tax Appellate Tribunal, Jodhpur Bench Jodhpur dated 9th May, 2003 deciding cross appeals filed by the assessee and the revenue in respect of block assessment period 1.4.1988 to 15.7.1998, pursuant to a search which has taken place on the premises of the assessee in August 1998.

In appeal following substantial questions of law have been suggested:-

"I. Whether on the facts and in the circumstances of the case, the learned Tribunal (ITAT) was legally correct in dismissing the department appeal by not accepting the time period allowed under Section 153(3) Explanation 1 (iii) r/w Section 158BH of the I.T. Act, and not deciding the appeal on merits?

II. Whether on the facts and in the circumstances of the case, the learned tribunal was justified in holding that there is violation of mandatory rules inasmuch as there was no approval of the CIT for getting the books of accounts audited u/s 142 (2A) of the Act, therefore, the same was invalid, despite the fact that the reference was made absolutely in conformity with the provisions of S.142 (2A) of the Act?

III. Whether the learned tribunal was justified in holding that CIT has no power under the Act to extend the time and Assessing Officer is only competent to extend time upon application of the assessee by virtue of proviso to Section 142 (SA) of the I.T. Act?

With regard to substantial question of law raised in this appeal about the expiry of limitation for completing the assessment for the block period in terms of Section 158 BE, the Tribunal found the assessment of Block Period 1988-98 framed on 8.3.2001 to be barred by time in view of the existing provisions as on the date the assessment was made.

The facts which are not in dispute are that in pursuance of the authorisation of search, last of Panchanama against the assessee was prepared on 28th August,

1998. An order under Section 142 (2A) of the Act of 1961 was made on 2.8.2000 requiring the assessee to get his book of accounts subjected to special audit within a period of 120 days which at the request of auditor was extended by 60 days, totaling to 180 days later on by the CIT concerned. The period of limitation for completion of assessment in respect of authorisation of search executed prior to 1.1.1997 is one year and is governed by clause (a) of Section 158BE(1). Such period of limitation is two years under Section 158BE(1)(b) in case authorisation of search is executed on or after 1.1.1997. In the present case, since last of the authorisation of search was executed on 28th Aug., 1998, the limitation for completing assessment for block period of 1988-98 is governed by clause (b) of Sec.158B(1). The assessment order was made on 8.3.2001.

The Tribunal found the assessment to be barred by time. It was found that the extension of period for submitting report of special audit at the request of auditor to complete the special audit from 120 days to 180 days under Section 142 (2A), being contrary to the provisions of the Act was invalid and strictly speaking the Assessing Officer cannot take advantage of more than 120 days to the maximum for exclusion of the period for completing of Assessment. It also found that direction to get the special

audit conducted itself to be not bonafide and was only an attempt to get period of limitation for completing the assessment extended under clause (2) to Explanation 1 to Section 158BE, by seeking the exclusion of time in computing the period of limitation. It also found that even by excluding the entire period of 180 days for conducting special audit under Section 142 (2A) for the purpose of computing the period of limitation, still assessments framed on 8th March, 2001 were barred by time.

The revenue on the other hand claims exclusion of 180 days in computing the period of limitation of 2 years under Section 158BE as the time required to furnish a report of special audit as directed under Section 142(2A) and also relied on proviso to Explanation 1 for further extending the remaining period on the expiry of two years and 180 days to the extent it fell short by 60 days of the period requiring for completing the assessment. The proviso came into effect w.e.f. 1st June, 2002 on commencement of Finance Act, 2002 by which Explanation 1 to Sec.158BE was substituted in place of previous Explanation 1. In this connection, the learned counsel also placed reliance on provisions of Section 158BH read with Section 158 (3) of the Income Tax Act, 1961 to claim the benefit of extended period of limitation upto 60 days from the expiry of the period after exclusion of 180

days, the time requisite for completing the special audit.

We may notice the relevant provisions of Section 158BE. Sub-section (1) clause (b) with explanations to Section 158BE as it existed on 8.3.2001 read as under:-

> "**158BE. Time limit for completion of block assessments**
>
> (1) The order under section 158BC shall be passed-
> (a) .....
>
> (b) within two years from the end of the month in which the last of the authorisations for search under section 132 or for requisition under section 132A, as the case may be, was executed in case whereas search is initiated or books of account or other documents or any assets are requisitioned on or after the 1st day of January, 1997.
>
> (2) ......

"Explanation [1].- In computing the period of limitation for the purposes of this section, the period-

> (i) during which the assessment proceeding is stayed by an order or injunction of any court, or
>
> (ii) commencing from the day on which the Assessing Officer directs the assessee to get his accounts audited under sub-section (2A) of section 142 and ending on the day on which the assessee is required to furnish a report of such audit under that sub-section,
>
> shall be excluded."

"Explanation 2.- For the removal of doubts, it is hereby declared that the authorisation referred to in sub-section

(1) shall be deemed to have been executed,-

(a) in the case of search, on the conclusion of search as recorded in the last panchnama drawn in relation to any person in whose case the warrant of authorisation has been issued.

(b) in the case of requisition under section 132A, on the actual receipt of the books of account or other documents or assets by the Authorised Officer."

It will be relevant to notice in brief the legislative history of the two Explanations. When the chapter XIV B consisting of Sections 158B to 158BH was enacted and inserted in Income Tax Act, 1961 by the Finance Act 1995 w.e.f. 1.7.1995, no Explanations were enacted. Neither any provision for exclusion of any period for any reason in computing period of limitation provided under Sec.158BE was made, nor any provision was made assigning meaning to term execution of authorisation. By Finance Act (No.2) of 1996 an Explanation, later on renumbered as Explanation 1, was inserted in above form with retrospective effect w.e.f. 1.7.1995 commensurating with commencement of chapter XIVB. It contained only two clauses of exclusion of period from computation of limitation. Vide Finance Act No.2 of 1998 Explanation 2, as above, was inserted after renumbering existing Explanation as Explanation 1. Explanation 2 defined the meaning of execution of

authorisation.

Applying the aforesaid provision as on date the block assessment was made i.e. 8.3.2001, the arithmetic of period of limitation on the aforesaid anvil is clear and undisputed that bereft of the controversy about the validity of order under Section 142 (2A) or the extension of period for furnishing the report under Section 142(2A), by excluding full period 180n days results in expiry of the period of limitation on 27th Feb., 2001. The commencement of the limitation takes place from the end of the month in which last of the authorisation for search was executed which we have noticed was executed on recording of the last panchnama on 28th August, 1998. The limitation period, therefore, for completion of assessment for the block period 1988-98 commenced on 1st of Sept., 1998 and the two years would expire on 31st August, 2000.

The period which is sought to be excluded by the revenue under clause 2 of Explanation 1 to the maximum limit of 180 days if added after 31st August 2000, the period expires on 27th Feb., 2001. The assessment was still barred by limitation by 9 days.

Therefore, unless the benefit of proviso inserted

vide Finance Act, 2002 w.e.f. 1.6.2002 can be extended to the revenue, the limitation had clearly and unquestionably expired for completing the assessment for block period in question when the order was made. This is also not a matter of contention.

The new Explanation 1 has been substituted, as noticed above, by Finance Act, 2002 w.e.f. 1.6.2002. The substituted Explanation 1 reads as under:-

"Explanation 1.- In computing the period of limitation for the purposes of this section,--

(i) the period during which the assessment proceeding is stayed by an order or injunction of any court; or

(ii) the period commencing from the day on which the Assessing Officer directs the assessee to get his accounts audited under sub-section (2A) of section 142 and ending on the day on which the assessee is required to furnish a report of such audit under that sub-section; or

(iii) the time taken in reopening the whole or any part of the proceeding or giving an opportunity to the assessee to be re-heard under the proviso to section 129; or

(iv) in a case where an application made before the Settlement Commission under section 245C is rejected by it or is not allowed to be proceeded with by it, the period commencing on the date on which such application is made and ending with the date on which the order under sub-section (1) of Section 245D is received by the Commissioner under sub-section (2) of that section,

shall be excluded.

> **Provided that where immediately after the exclusion of the aforesaid period, the period of limitation referred to in sub-section (1) or sub-section (2) available to the Assessing Officer for making an order under clause (c) of section 158BC is less than sixty days, such remaining period shall be extended to sixty days and the aforesaid period of limitation shall be deemed to be extended accordingly."**

Apparently, the substituted provision has not been given retrospective effect and no benefit can be derived by the revenue on account of such proviso.

The principle governing the limitation is settled that wherever the law of limitation is altered providing for completing the proceedings or for initiating the proceedings, the extended period can be availed where the limitation in respect of said transaction still exists. If the limitation for completing the proceedings or initiating the proceedings have already expired prior to the amending provisions, extending the period of limitation does not result in relaxing the limitation, unless specific provision is made to that effect. In fact, if the limitation period is reduced which results in expiry of the period of limitation before the commencement of the Act, it needs specific

saving clauses to save the existing clauses to be preserved on such amendment of the provisions. The illustration can be found that the Limitation Act 1963 which has made provisions for saving the limitation where the reduced period of limitation has already expired prior to the commencement of amending the provisions by enacting Section 30.

Under the Income Tax Act also the period of completion of assessment has been made. The provision has also been made for reopening the completed assessments.

In taxing statutes, though the period of limitation has not been considered to be statute of repose, but somewhat same position has been accepted. It will be apposite to recall what justice Hidatullah, as his Lordship then was, had said in S.C. Prashar, I.T.O. Vs. Vasantsen Dwarkadas and others **AIR 1963 SC 1356:-**

> ".....We wish to say a few words about well known principle that subsequent charges in the period of limitation do not take away an immunity which has been reached under the law as it was provisionally. In this sense statues of limitation has been picturesquely described as "statutes of repose"... in our opinion, it somewhat inapt to describe Section 34 with its amendments and validity Section as a section of repose. Under that section, there is no repose till the tax is paid or the tax cannot be collected. **What the law does by** prescribing certain periods of time for acting is to create a bar against its own officers administering the law. It

> tries to twin between recovery of tax and possibility of harassment to an innocent person and fixes a duration for action from these two points of views. These periods are occasionally readjusted to cover some cases which would otherwise be left out and hence, amendments. An assessment can be said to become final and conclusive if no action can touch it, **but where the language of the statute clearly reopens closed transactions, there can be no finality".**

The court emphasised that to reopen the closed transaction, there must be clear mandate of statute, otherwise the period of limitation acts as repose.

The Supreme court has reiterated the principles in a recent decision in K.M. Sharma Vs. Income Tax Officer **[2002] 254 I.T.R. 277.** It was a case where challenge was made to the notice issued under Section 148 of the Act for reassessment for the assessment year 1968-79 to 1971-72 and for the year 1982-83 on the ground that the proposed reassessment for those assessment years had already become barred by time under Section 149 of the Act, for which in the relevant periods a maximum period of four years or seven years limitation was prescribed depending upon the quantum of estimated escaped liability towards tax.

The revenue had relied on the amendment made in Section 150(1) of the Act as amended w.e.f. April 1989. It

was contended by the revenue that the limitation prescribed under Section 149 will not be attracted by virtue of the provisions of Section 150(1) because the notices for reassessments were based on the awards passed in the land acquisition proceedings by the court of the Additional District Judge on a reference made under Section 18 of the Land Acquisition Act. Upholding the validity of the assessment proceedings initiated by the Department under Section 148 of the Act, the High Court rejected the contention of the assessee that sub-section (2) of Section 150 of the Act is an Explanation to sub-section (1) and proceedings for reassessment, which had already become barred by time under Section 149 of the Act before April 1, 1989, could not have been commenced on the basis of amended provisions of sub-section (1) of Section 150. Under the Income Tax Act, 1961 the extended period of making an order under Section 150(1) came into effect w.e.f. 1.4.1989.

The High Court had accepted the contention of the revenue and dismissed the petition by finding that the revenue was entitled to seek the benefit under the amended proviso under Section 150.

Reversing the decision of the High Court the apex Court said:-

> “A fiscal statute, more particularly one regulating the period of limitation, must receive a strict construction. The law of limitation is intended to give certainty and finality to legal proceedings and to avoid exposure to risk of litigation of litigants for an indefinite period on future unforeseen events. Proceedings which had attained finality under existing law due to bar of limitation cannot be held to be open for revival unless the amended provision is clearly given retrospective operation so as to allow upsetting of proceedings which had already concluded and attained finality.”
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> “The amendment to sub-section (1) of Section 150 of the Income Tax Act, 1961, extending the bar of limitation in cases of orders passed by a Court in proceedings under any other law is not expressed to be retrospective and, therefore, has to be held to be only prospective. The amendment to section 150(1), which intends to lift the embargo of the period of limitation under section 149 to enable the authorities to reopen assessments not only on the basis of orders passed in proceedings under the Income tax Act but also on the basis of an order of a court in any proceedings under any law has to be applied prospectively on or after April 1, 1989, when the amendment was introduced. The provisions of sub-section (1), therefore, can have only prospective operation to assessments which have not become final due to the expiry of the period of limitation prescribed for assessments under Section 149 of the Act.”

The ratio of the aforesaid decision fully governs this case. The benefit of extended period of limitation under the proviso to Explanation 1 has specifically been extended prospectively to pending matters only by ordaing

the substituted provisions to be effective from prospective date i.e. 1.6.2002 only. This provision cannot affect the assessment proceedings which had already been completed prior to substitution of new explanation 1 in place of repealed one. If such assessment has been made after expiry of period of limitation, when ITO had ceased to hold such jurisdiction, the same cannot be validated in the absence of specific provision in statute reaching it, only by referring to a provision which has been subsequently enacted with specific direction about its prospective operation.

The learned counsel for the appellant has urged that even without the amendment, under Section 158BH, provisions of Section 153 are attracted. It provides that `**save as otherwise provided in this chapter**' all other provisions of the Act are made applicable to proceedings under this chapter. The learned counsel drew our attention to Explanation 1 to section 153 which has the like provision as has been inserted through the substitution of Explanation 1 to Section 158BE for existing Explanation 1, w.e.f. 1.6.2002.

Suffice it to say that Section 158BH permits to look at the other provisions of the Act in the field in respect of which no provisions are made under chapter XIV B. Under Section 158BE specific provision has been made for

computing the period of limitation prescribed for making assessment under Section 158BE.

The Explanation 1 as inserted originally did provide specifically for exclusion of certain period while computing the period of limitation for making assessment for block period under Chapter XIV B, but neither it was couched para-materia with Section 153 nor it made section 153 applicable to it by incorporating such provision by reference. It is significant to notice that section 153 which provides for limitation for completion of certain proceedings does not lay down generally the mode of computing period of limitation wherever it may have been provided under the Act of 1961 but the substantive provisions as well as Explanation 1 to Section 153 are confined to computation of period of limitation prescribed under Section 153 only. Substantive provision provide limitation for completing assessments under Section 143 or Section 144 under sub-section (1) for assessment, re-assessment or re-computation under Section 147 (as per sub-section 2). Sub-section 2A deals with limitation for making fresh assessment under Section 146 or in pursuance of an order under Sections 250, 254, 263 or 264 setting aside or cancelling an assessment. All these provisions referred to assessment for particular assessment year only. It does not

provide for limitation in respect of any other proceedings e.g. period of limitation for making an order of rectification under Section 154 is governed by sub-section (7) of Section 154. Similarly, provisions for assessment for number of years together as one block were introduced for the first time vide Finance Act, 1995 w.e.f. 1.7.1995 in such cases. Period of limitation for such special assessment was too separately provided under Section 158BE. It provided independently period of limitation for completing assessment under Section 158BC and other provisions and also for exclusion of certain specified period in its computation.

Explanation 1 to Section 153 provides for exclusion of certain period in computing period of limitation provided under Section 153. It does not make a general provision of computation of period for completing all proceedings under the Act wherever such limitation is provided. Extension of period upto 60 days after completion of limitation under Section 153 read with its Explanation falls short of 60 days is envisaged in proviso to Explanation 1 to Section 153. It will be apposite to notice Explanation to Section 153:-

> "Explanation 1.- In computing the period of limitation for the purpose of this section-

(i) the time taken in reopening the whole or any part of the proceeding or in giving an opportunity to the assessee to be re-heard under the proviso to section 129, or

(ii) the period during which the assessment proceeding is stayed by an order or injunction of any court, or

(iia) the period commencing from the date on which the Assessing Officer intimates the Central Government or the prescribed authority, the contravention of the provisions of clause (21) or clause (22B) or clause (23A) or clause (23B) or sub-clause (iv) or sub-clause (v) or sub-clause (vi) or sub-clause (via) of clause (23C) of Section 143 and ending with the date on which the copy of the order withdrawing the approval or rescinding the notification, as the case may be, under those clauses is received by the Assessing Officer.

(iii) the period commencing from the date on which the (Assessing) Officer directs the assessee to get his accounts audited under sub-section (2A) of section 142 and ending with [the last date on which the assessee is required to furnish] a report of such audit under that sub-section, or

(iv) Omitted by the Direct Tax Laws (Amendment) Act, 1987, w.e.f. 1.4.1989.

(iva) the period (not exceeding sixty days) commencing from the date on which the [Assessing] Officer received the declaration under sub-section (1) of section 158A and ending with the date on which the order under Sub-section (3) of that section is made by him, or]

(v) in a case whee an application made before the Income-tax Settlement Commissioner under section 245C is rejected by it or is not allowed to be proceeded with by it, the period

commencing from the date on which such application is made and ending with the date on which the order under sub-section (1) of section 245D is received by the Commissioner under sub-section (2) of that section,

shall be excluded:

Provided that where immediately after the exclusion of the aforesaid time or period, the period of limitation referred to in sub-sections (1), (2) and (2A) available to the Assessing Officer for making an order of assessment, reassessment or recomputation, as the case may be, is less than sixty days, such remaining period shall be extended to sixty days and the aforesaid period of limitation shall be deemed to be extended accordingly.

Explanation 2.- Where, by an order any income is excluded from the total income of the assessee for an assessment year, then, an assessment of such income for another assessment year shall, for the purposes of section 150 and this section, be deemed to be one made in consequence of or to give effect to any finding or direction contained in the said order.

Explanation 3.- Where, by an order any income is excluded from the total income of one person and held to be the income of another person, then, an assessment of such income on such other person shall, for the purposes of section 150 and this section, be deemed to be one made in consequence of or to give effect to any finding or direction contained in the said order, provided such other person was given an opportunity of being heard before the said order was passed.”

A comparison of two provisions shows that under Explanation 1 to section 158BE originally the period to be excluded from computing the period of limitation under its clauses (i) and (ii) were the same as were to be excluded so under clauses (II) and (III) of Explanation to Section 153. No other provisions of Explanation 1 to Section 153 was included in Explanation 1 to Section 158BE. This was a legislative policy manifested by making specific and independent provisions for assessment under Chapter XIVB. If any provisions of Explanation 1 to section 153 were to apply as it were, in terms of Sec.158BH, to proceedings under chapter XIVB, there was hardly any reason which could have led to enactment of Explanation 1 to Section 158BE independently and differently from existing other provisions of the same enactment. Legislature is not presumed to indulge in any academic exercise and that too in truncated manner.

There being a clear provision made to cover the field of computation of limitation provided under Chapter XIVB and expressly provided taking into account the conditions which also were part of above referred provision of Section 153, but were not completely in accordance with the Section 153. The part of section 153 which was expressly not included in the provisions cannot by any

stretch of imagination be said that the provision has been made applicable in regard to computing limitation under Section 158BH. The fact that different period had been provided for cases depending on the date search warrant is executed a legal fiction defining the term is also enacted under Explanation 2.

Thus, on the interpretation of provisions of Section 158BE, if the contention of the learned counsel for the appellant is to be accepted, then insertion of original Explanation 1 firstly by inserting it retrospectively vide Finance Act, 1996 providing for exclusion of period only in two events and then again amending it by substituting Explanation 1 with prospective effect specifically w.e.f. 1.6.2002 extending the exclusion of period in some more contingencies, also commensurating with some of the provisions of Section 153, would have been wholly unnecessarily intended to be clarificatory in nature. Such intention cannot be attributed to the legislation.

In fact, Section 158BE provides a complete code prescribing limitation and mode for computing such period of limitation for assessment for block period. It provides for commencement of period of limitation, it provides specific circumstance or condition in which time is to be excluded.

It also prescribes the maximum extent upto which time is to be excluded in computing period of prescribed limitation. Thus, Section 158 BE being a complete code in itself on the subject of prescribing and computing limitation for completing block assessment, which itself is a special provision, other provisions of the Act outside the provisions are necessarily excluded.

That was the reason, the amendment in Section 158BE by substituting Explanation 1 was necessitated. It also given a clue that it was never intended to be clarificatory but was an excuse with non-purpose in nature but was by way of making substantial amendment. We may notice that by the amending provisions clauses (3) and (4) have been added for additional exclusion of period in computing limitation for completing block assessment under Section 158BE and proviso has also been added for computing limitation period in case time left after extension of time taken for the proceedings is less than 60 days, then the period for computing the assessment is extended upto 60 days. It does not make any provisions to indicate its operation to be retrospective in any sense like it was indicated while inserting Explanation later on re-numbered as Explanation 1 for the first time vide Finance Act, 1996 or while Explanation 2 was inserted vide Finance Act, 1998

making it effective w.e.f. 1.7.1995. Thus, not making specifically it retrospective in operation by and making it explicitly operative w.e.f. 1.6.2002 only the substituted Explanation 1 vide Finance Act, 2002 can have no application to the present case on its own force. Nor any provision has been made validating assessments made prior to substitution of new Explanation 1 w.e.f. 1st June, 2002, which otherwise might fall within the ambit of proviso, if it were then in operation. In the absence of such saving/validating provisions the assessment made on 8.3.2001 was clearly barred by time when made as per extant provisions and were not validated by subsequent amendment of the Act through substitution of Explanation 1 to Section 158 BE w.e.f. 1st June, 2002.

Since excluding the entire period of 180 days, the assessment order does not fall within the period of limitation and the assessment order in question fail on that ground alone, we do not deem it appropriate to consider the contention of learned counsel for the respondents that even otherwise the appellants are not entitled for any benefit of exclusion of period for having special audit under Section 142(2A) of the Act or at any rate beyond 120 days as has been found by the Tribunal.

The appeal fails and is hereby dismissed. No order as to costs.

[AJAY RASTOGI], J. [RAJESH BALIA], J.

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